SHARIFUDDIN MOHAMED & ANOR v. DATO' ANNAS KHATIB JAAFAR & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZAMANI A RAHIM JCA
ZALEHA YUSOF J
[CIVIL APPEALS NO: W-102-732-04-2014, W-102-775-04-2014 & W-02-960-05-2014]
22 JANUARY 2016

TORT: *Defamation – Libel – Article published in newspaper – Investigation on awarding of construction contract by management – Article regurgitated contents of Anti-Corruption Agency report – Whether article mentioned specific names – Whether 'management' referred to plaintiff – Whether words complained of defamatory – Failure to comply with requirements of O. 78 r. 3(3) of Rules of Court 2012 – Whether respondent prevented from raising evidence of express malice – Whether defences of qualified and absolute privilege applied – Whether publisher entitled to protection under Reynolds privilege – Whether report and its republication had absolute privilege status*

The Chairman of the Board of Directors ('the third defendant') of Lembaga Kemajuan Ikan Malaysia ('LKIM') had lodged a report with the Anti-Corruption Agency ('ACA'), calling for an investigation on the awarding of a certain construction contract by the LKIM's management which was allegedly questionable and did not comply with the contract awards procedure. The third defendant did not hear anything from the ACA and this prompted him to relate the events to the publisher, printer and proprietor of Harian Metro, Berita Harian and New Straits Times ('the second appellant'). An article entitled 'Siasat Kontrak LKIM' with the sub-heading 'Lembaga Pengarah Lapor BPR' ('the article') was written, printed and published in Harian Metro. Believing the article to be libellous as it referred and bore meaning defamatory of him personally, the Director General of LKIM ('the respondent') claimed for damages against the appellants at the High Court. The appellants pleaded the defence of *Reynolds* privilege. In arriving at her decision, the High Court Judge ('HCJ') referred to the ACA report and opined that the article regurgitated the contents of the report. The HCJ held that the appellants were motivated by express malice in publishing the article and it was defamatory of the respondent. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the article referred to the respondent; (ii) whether the words complained of were defamatory; (iii) whether the defence of *Reynolds* privilege applied; and (iv) whether the defence on absolute privilege applied since the article reported on the contents of an ACA report.

Held (allowing appeal)
Per Zaleha Yusof J delivering the judgment of the court:

(1) There was no reference to the respondent at all in the article. In fact, there was no specific name mentioned. The article merely referred to the management. Any reference to the management could not be taken to mean reference to the respondent singularly as the management comprised several people and not the respondent solely. Furthermore, the construction contract was awarded prior to the appointment of the respondent to the post of Director General of LKIM. Reasonable people who knew the respondent would not come to the conclusion that the article referred to the respondent. (paras 8, 15, 16, 17 & 21)

(2) The words complained of were incapable of bearing any defamatory meaning to the respondent. The ACA report was not within the public domain and not within the sight of ordinary reasonable man. The trial judge fell into error by referring to the ACA report which was an extrinsic evidence and not confining her determination of whether the words were capable of a defamatory meaning by purely looking at the words complained of and/or the passages in the article. (paras 25 & 27)

(3) The appellants were entitled to the protection afforded under the *Reynolds* privilege. The HCJ rejected the appellants' defence and proceeded to look at the issue of malice. However, the respondent was prevented from raising evidence of express malice when it failed to comply with the requirement of O. 78 r. 3(3) of the Rules of Court 2012 by failing to (i) plead particulars of the specific facts and matters relied on from which an inference of malice could be drawn; and (ii) file and serve a statement of reply to the appellants' defence which clearly pleaded reliance on the defence of qualified privilege. (paras 31, 34, 35 & 36)

(4) The ACA report was akin to a police report in that they both call for an investigation into suspected act of criminal wrongdoing and as such, would be protected by absolute privilege. The trial judge erred in holding that the ACA report had lost its absolute privilege status and that the defence of absolute privilege was not applicable in any manner. The republication of the ACA report, an absolutely privileged document, would enjoy the same protection of ancillary absolute privilege. (paras 39, 44 & 46)

***Bahasa Malaysia** Headnotes*

Pengerusi Lembaga Pengarah ('defendan ketiga') Lembaga Kemajuan Ikan Malaysia ('LKIM') telah membuat laporan kepada Badan Pencegah Rasuah ('BPR'), memohon siasatan berkenaan award satu kontrak pembangunan oleh pihak pengurusan LKIM yang didakwa meragukan dan tidak mematuhi

tatacara award kontrak. Defendan ketiga tidak mendapat apa-apa maklum balas daripada BPR dan dia memperihalkan perkembangan ini kepada penerbit, pencetak dan pemilik Harian Metro, Berita Harian dan New Strait Times ('perayu kedua'). Satu rencana bertajuk 'Siasat Kontrak LKIM' dengan tajuk kecil 'Lembaga Pengarah Lapor BPR' ('rencana') ditulis, dicetak dan diterbitkan dalam Harian Metro. Atas kepercayaan rencana tersebut satu fitnah bertulis kerana merujuk dan mempunyai maksud memfitnah terhadap peribadinya, Ketua Pengarah LKIM ('responden') menuntut ganti rugi terhadap perayu-perayu di Mahkamah Tinggi. Perayu-perayu membangkitkan pembelaan perlindungan *Reynolds*. Dalam mencapai keputusan beliau, Hakim Mahkamah Tinggi ('HMT') merujuk laporan BPR dan berpendapat rencana tersebut meluahkan kandungan laporan. Beliau memutuskan bahawa perayu-perayu nyata terdorong oleh niat jahat dalam menerbitkan rencana tersebut dan ini memfitnah responden. Oleh itu, timbul rayuan ini. Isu-isu berbangkit bagi pemutusan mahkamah adalah (i) sama ada rencana tersebut merujuk pada responden; (ii) sama ada perkataan-perkataan yang diadukan bersifat memfitnah; (iii) sama ada pembelaan perlindungan *Reynolds* terpakai; dan (iv) sama ada pembelaan perlindungan mutlak terpakai kerana rencana melaporkan tentang laporan BPR.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Yusof H menyampaikan penghakiman mahkamah:

(1) Rencana tersebut tidak membuat apa-apa rujukan pada responden. Malah, tiada nama khusus yang dinyatakan. Rencana sekadar merujuk pada pihak pengurusan. Apa-apa rujukan pada pihak pengurusan tidak boleh dikatakan merujuk pada responden kerana pihak pengurusan terdiri daripada beberapa orang dan bukan responden sahaja. Tambahan lagi, kontrak pembangunan diawardkan sebelum responden dilantik sebagai Ketua Pengarah LKIM. Orang munasabah yang mengenali responden tidak akan membuat kesimpulan bahawa rencana tersebut merujuk pada responden.

(2) Perkataan-perkataan yang diadukan tidak mempunyai maksud memfitnah responden. Laporan BPR bukan dalam ruang lingkup orang awam dan bukan dalam capaian orang biasa yang munasabah. Hakim bicara terkhilaf apabila merujuk laporan BPR iaitu satu keterangan ekstrinsik dan tidak mengehadkan keputusan sama ada perkataan-perkataan tersebut boleh bermaksud memfitnah dengan melihat pada perkataan-perkataan yang diadukan dan/atau petikan-petikan dalam rencana sahaja.

(3) Perayu-perayu berhak mendapat perlindungan *Reynolds*. HMT menolak pembelaan perayu-perayu dan terus melihat isu niat jahat. Walau bagaimanapun, responden terhalang daripada membangkitkan keterangan niat jahat yang nyata apabila gagal mematuhi keperluan

A. 78 k. 3(3) Kaedah-Kaedah Mahkamah 2012 dengan kegagalannya (i) memplidkan butir-butir fakta dan hal perkara khusus yang menjadi sandaran bagi membuat kesimpulan wujudnya niat jahat; dan (ii) memfailkan dan mengemukakan penyataan balas terhadap pembelaan perayu-perayu yang jelas memplidkan sandaran pada pembelaan perlindungan bersyarat.

(4) Laporan BPR sama dengan laporan polis dalam aspek kedua-duanya memerlukan siasatan terhadap tindakan salah laku jenayah yang disyaki dan dengan itu, mendapat perlindungan mutlak. Hakim bicara khilaf dalam memutuskan bahawa laporan BPR hilang status perlindungan mutlak dan bahawa pembelaan perlindungan mutlak tidak terpakai dalam apa-apa jua cara. Penerbitan semula laporan BPR, satu dokumen yang dilindungi secara mutlak, akan mendapat perlindungan mutlak sampingan.

Case(s) referred to:
Aaron & Ors v. Cheong Yip Seng & Ors [1996] 1 SLR 623 ***(refd)***
Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***
Binaan Sentosa Sdn Bhd v. Ng In Kun & Anor [2012] 2 CLJ 232 HC ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Dato Annas Khatib Jaafar v. Datuk Manja Ismail & Ors [2011] 1 LNS 167 HC ***(refd)***
Dato' Annas Khatib Jaafar v. The New Straits Times Press (M) Bhd & Ors [2013] 4 CLJ 96 HC ***(refd)***
Flood v. Times Newspaper Ltd [2012] 2 AC 273 ***(refd)***
Jameel v. Wall Street Journal Europe Sprl [2007] 1 AC 359 ***(refd)***
Kelly v. O'Malley [1889] 6 TLR 62 ***(refd)***
Lee Yoke Yam v. Chin Keat Seng [2012] 9 CLJ 833 FC ***(refd)***
Microsoft Corp v. SM Summit Holdings Ltd [1999] 3 SLR (R) 465 CA ***(refd)***
Reynolds v. Times Newspaper Ltd [2001] 2 AC 127 ***(refd)***
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 HC ***(refd)***
Soh Chun Seng v. CTOS-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***
Subramaniam Parasivam v. Courts Mammoth Bhd & Anor [2011] 10 CLJ 739 HC ***(refd)***
Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim [2010] 8 CLJ 239 HC ***(refd)***
Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 78 r. 3(3)

Other source(s) referred to:
Duncan & Neill, *Defamation*, 3rd edn, pp 203, 204, 205
Gatley, *Libel and Slander*, 11th edn, p 377

(Civil Appeal No: W-02-732-04-2014)
For the appellants - Rueben Mathiavaranam (G Navinthar with him); M/s TH Liew & Partners
For the respondent - Shamsul Bahrain Ibrahim; M/s Bahrain

(Civil Appeal No: W-02-775-04-2014 & W-02-960-05-2014)
For the appellant - K Harikrishnan; M/s M Mahendra & Co
For the respondent - Shamsul Bahrain Ibrahim; M/s Bahrain

[Editor's note: For the High Court judgment, please see Dato' Annas Khatib Jaafar v. Sharifuddin Mohamed & Ors [2014] 1 LNS 1849 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof J:

[1] This is an appeal against the decision of the trial judge in allowing the respondent's action against the appellants for damages for libel that was allegedly written, printed and published or caused to be written, printed and published of the respondent/plaintiff by the appellants/defendants in a national Malay language newspaper, the Harian Metro daily on the 10 April 2007. The said article appeared at p. 14 of the said newspaper, entitled "siasat kontrak LKIM" with the sub-heading "Lembaga Pengarah lapor BPR" (impugned article). The impugned article purportedly contained the words complained of on the alleged wrongdoings of the respondent/plaintiff in his capacity as the Director General of the Malaysian Fisheries Development Authority or Lembaga Kemajuan Ikan Malaysia (LKIM), a statutory body incorporated under the LKIM Act 1971.

[2] The order in respect of liability favouring the respondent was made on 24 March 2014 and the order in respect of quantum was made on 24 April 2014.

[3] It must also be mentioned here that the first appellant/defendant was at all material times the chief news editor of the said Harian Metro newspaper, and an employee of the second appellant. The second appellant/defendant is the publisher, printer and proprietor of the Harian Metro and also of the Berita Harian and New Straits Times which are respectively another Malay language and English language newspapers. The third appellant/defendant was at all material times the Chairman of the Board of Directors of LKIM.

[4] The impugned article is set out verbatim in full in para. 3 of the statement of claim. It reported that LKIM through its Chairman, the third appellant/defendant, had three months before, lodged a report with the Anti-Corruption Agency (ACA) calling for an investigation into the award by LKIM's management of a construction contract for the construction of the Kuala Kedah LKIM Complex which was alleged to be questionable and did not comply with contract awards procedure. The third appellant/defendant had gone to the second appellant/defendant to relate the events that led to his report lodged with the ACA as he heard nothing from the ACA after the three months lapse. The respondent/plaintiff claims that the impugned article refers to him personally and bear meanings defamatory of him personally.

[5] We must also make a note here that the same story came out as a report simultaneously in the New Straits Times and Berita Harian newspapers on 10 April 2007. The respondent/plaintiff had filed two separate actions against the two newspapers. Both cases were dismissed at the High Court level as well as during appeal at the Court of Appeal.

Issues

[6] In this appeal, the relevant issues are as follows:

(i) whether there was reference to the respondent/plaintiff;

(ii) whether the words complained of are capable of a defamatory meaning;

(iii) whether the defence of *Reynold* privilege applied; and

(iv) whether the defence of absolute privilege applied since the impugned article reports on the content of an ACA report.

Note: This defence of absolute privilege was raised by the learned trial judge although it was not part of the pleaded defence

Decision

Whether There Was Reference To The Plaintiff

[7] It is the learned trial judge's finding that the words complained of as set out in para. 3 of the statement of claim referred to and were understood to refer to the respondent/plaintiff even though his name is not stated in the impugned article. Her reason was as the impugned article was substantially a regurgitation of the third appellant/defendant's report to the ACA and as the report to the ACA was lodged because LKIM was not satisfied with the management's action which were seen not only as wrong procedurally but had also caused wastage of government's fund, hence it is clear that the impugned article contains word which imported guilt on the part of the respondent/plaintiff. The learned trial judge was also of the view that the court ought to look at the ACA report and read it together with the impugned article in order to determine whether the words complained of refers to the respondent/plaintiff and whether they were defamatory.

[8] We have read the impugned article. With due respect to the learned trial judge, we cannot find any reference to the respondent/plaintiff at all in it. It merely refers to "pengurusan" (management). As submitted by learned counsel for the appellants/defendants, any reference to the management cannot be taken to mean reference to the respondent/plaintiff singularly as management does not comprise solely of the respondent/plaintiff but of several people.

[9] As mentioned earlier, identical actions were taken by the respondent/plaintiff against the Berita Harian and the New Straits Times over similar article.

[10] A similar issue as to whether a reference to the "management" can be regarded as a reference to the plaintiff singularly was considered in both cases. In the *Berita Harian* case, the High Court as reported in *Dato Annas Khatib Jaafar v. Datuk Manja Ismail & Ors* [2011] 1 LNS 167; [2011] 8 MLJ 747 (*Berita Harian* case) held *inter alia* as follows:

> Held, dismissing the plaintiffs claim with costs:
>
> (1) ...
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> (2) ... the impugned article further made no reference to the plaintiff at all, to say that it was defamatory of the plaintiff. The alleged complaint was against the management of LKIM of which the plaintiff was the Director General (see para 5).

And later on at p. 752, the learned judge says:

> [6] Looking at the impugned article as a whole and giving the same its natural and ordinary meaning, it remains an alleged complaint against the management of LKIM and not the plaintiff singularly. The plaintiff further conceded in cross examination that these complaints and allegations had to be investigated.

[11] The Court of Appeal *vide* an order dated 25 March 2013 in Court of Appeal Civil Appeal No: W-02-123-2011 upheld and affirmed the above decision.

[12] In the *New Straits Times* case, as reported in *Dato' Annas Khatib Jaafar v. The New Straits Times Press (M) Bhd & Ors* [2013] 4 CLJ 96, (*New Straits Times* case) the High Court held at p. 97, held (3) as follows on the reference point:

> (3) It is trite that in a defamation action, there must be "publication of defamatory words of and concerning the plaintiff personally". Where this is absent, the action will fail and the defence is bound to succeed and this forms another ground for striking out an action for being an abuse of the court process. In the instant action, a close examination of the NST report revealed that there was no reference to the plaintiff ie, there was no publication of defamatory words of and concerning the plaintiff personally. (para 5)

[13] The Court of Appeal had also *vide* an order dated 11 October 2013 *vide* Court of Appeal Civil Appeal No: W-02(IM)-22-01-2013 affirmed and upheld the said High Court decision.

[14] In *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559; [2003] 4 MLJ 96, it was held *inter alia* that:

> (3) The 'test' to be applied where a plaintiff is not specifically named is whether the words were such as would reasonably, in the circumstances, lead persons acquainted with him to believe that the person referred to by those words was the plaintiff (see p. 110C) *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 followed. Extrinsic evidence may go to show

A that a given statement, considered to be defamatory, was thought to refer to the plaintiff. A plaintiff will not need, in every case, to produce witnesses who will actually testify that they felt the article referred to him. It would, of course, be much better if the plaintiff could produce such witnesses (see p. 113B).

B **[15]** The question here is whether the person acquainted with the respondent/plaintiff would believe that the person referred to in the impugned article was the respondent/plaintiff. The point is, there was no specific name mentioned in the impugned article but management.

[16] To answer that question, it must also be borne in mind that the C impugned article talked about suspicion over awards of a contract for the construction of the LKIM Complex and works related thereto to a company by way of direct negotiation nowithstanding that the construction involved no specific expertise. It must also be borne in mind that the construction contract was first awarded in the year 2002; during the tenure of the previous D Director General of LKIM and prior to the appointment of the respondent/ plaintiff to the said post of Director General of LKIM. This issue was also considered and decided in the *Berita Harian* case as follows:

> [5] Those who knew the plaintiff especially members of the Administrative and Diplomatic Service, would know the report referred merely to a E complaint to the Anti-Corruption Agency ('ACA'). Further they would be aware when the plaintiff took over as Director General of LKIM and that the matters referred to in the impugned article were before his appointment. The impugned article further makes no reference to the plaintiff at all, to say that it is defamatory of the plaintiff. The alleged complaint is against the management of LKIM of which the plaintiff was F the Director General ...

[17] We agree with the appellants/defendants submission that reasonable people who know the plaintiff/respondent would not come to the conclusion that the impugned article referred to the plaintiff/respondent for the same reason as in the *Berita Harian* case that the matters reported in the impugned G article occurred before his appointment as Director General of LKIM.

[18] In determining the question of identification of the plaintiff the learned trial judge had held at p. 100 of her judgment that it was necessary for the court to read the impugned article together with the ACA report. With due respect, as submitted by the appellants/defendants, that is indeed a grave H error on the part of Her Ladyship. The ACA report was not the impugned article complained of. The impugned article as pleaded by the respondent/ plaintiff was only the Harian Metro news report dated 10 April 2007 as expressly identified at para. 3 of the statement of claim. It is trite and it is a cardinal rule in civil litigation that the parties must abide by their pleadings. I Refer to the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665. The parties should know best as to what they want and

it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Refer to Court of Appeal in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79.

[19] As such the approach taken by the learned trial judge in looking into the ACA report in order to determine if the respondent/plaintiff was identified in the impugned article clearly fell into grave error and with all due respect, is without any legal precedent.

[20] Another interesting point that we feel must be highlighted here is at paras. 147 (11) and (12) of her grounds of judgment, the learned trial judge had stated that all the officers attached to the Malaysian Administrative and Diplomatic Service (MADS) and all the members and committee members of the State Fishermen Association considered that the Harian Metro article referred to the respondent/plaintiff. This, in our opinion, is totally wrong finding of facts as there is nothing in the notes of evidence to show that evidence has been adduced as such by someone from such bodies. Again the learned trial judge had erred in fact by stating such.

[21] To conclude, we are satisfied that there was no reference to the respondent/plaintiff at all in the impugned article.

Whether The Words Complained Of Are Capable Of A Defamatory Meaning

[22] The learned trial judge had found that the words complained of in the impugned article are defamatory as they gave rise to importations that the respondent/plaintiff is guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of a direct negotiation for the construction and completion of the LKIM Complex and works related thereto. Those words according to the learned trial judge are words which impute to the respondent/plaintiff the commission of the crime of bribery and corruption for which he can be made to suffer "corporally by way of punishment". The learned trial judge had also referred to the ACA report and stated that the respondent/plaintiff had pleaded the contents of the entire ACA report word for word in para. 3 of the statement of claim.

[23] Again, we would like to refer to the *Berita Harian* case in which at p. 752 the court held as follows:

> [6] Looking at the impugned article as a whole and giving the same its natural and ordinary meaning, it remains an alleged complaint against the management of LKIM and not the plaintiff singularly. The plaintiff further conceded in cross examination that these complaints and allegations had to be investigated.

A [7] The alleged defamatory sting to the impugned article which essentially are allegations being made to enable the same to be fully investigated is confined to that and no more. See *Sivabalan a/l P Asapathy v. New Straits Times Press (M) Sdn Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 the decision of His Lordship Mohd Zawawi Salleh J where he held:

B (1) The news report merely makes an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff is guilty of rape and several other allegations. Thus, the 'sting' of the new report is that the plaintiff is merely suspected of alleged to have committed the acts referred to and that the police have detained him for investigations. Further, the plaintiff's witness SP1
C and SP2, agreed during cross, examination that when read as a whole and in its context, the news report merely contained allegations against the plaintiff rather than factual statements imputing guilt on the plaintiff. Therefore, the words complained of in the news report are not defamatory of the plaintiff. The plaintiff has failed to establish the first element required in order to
D maintain a cause of action in defamation.

[24] Hence, as submitted by the appellants/defendants, the court in Berita Harian case too found that the words complained of appearing in the Berita Harian impugned article were not defamatory of the plaintiff. And this decision was affirmed and upheld by the Court of Appeal.

E

[25] In our view, having read the impugned article as a whole and in its context, it merely says that the third appellant/defendant as Chairman of LKIM had lodged a complaint or report with the ACA calling for an investigation into the award of the contract for construction which was
F allegedly questionable and did not comply with contract award procedures, and thus giving rise to misgivings. Even the plaintiff had during cross-examination conceded that the allegation level in the impugned article are subject to investigation. So the words were mere allegation which were to be investigated upon and not a statement of fact that he was guilty. Hence, we are of the view that the words complained of in this instance would clearly
G be incapable of bearing any defamatory meaning of the respondent/plaintiff. In *Binaan Sentosa Sdn Bhd v. Ng In Kun & Anor* [2012] 2 CLJ 232, the High Court held *inter alia*:

Reading the newspaper article in its totality and within its context, I agree with D2 that the article makes nothing more but merely an allegation that
H plaintiff had charged the properties purchased to a bank instead of applying for and obtaining individual strata title. Nowhere has it been stated that plaintiff is guilty of wrongdoing. This is evident from the words "Pemaju didakwa", "membuat laporan" dan "mendakwa". The article takes the form of complaints against plaintiff contained in a police
I report which is to be investigated upon.

Refer also to *Flood v. Times Newspaper Ltd* [2012] 2 AC 273.

[26] In the *New Straits Times* case, it was also held at p. 105 as follows: A

> (u) When the NST report is examined closely, it will be noticed that there is no reference to the plaintiff (apart from the last paragraph of the report where his comments were sought in his capacity as LKIM's Director General about the allegations levelled against LKIM's management). In other words, there is no publication of defamatory words of and B concerning the plaintiff's personally. It is trite that in a defamation action, there must be 'publication of defamatory words of and concerning the plaintiff personally'. This is an essential prerequisite. Where this is absent, the action will fail and the defence is bound to succeed.

[27] We are also agreeable with the appellants/defendants in their C submission that learned trial judge clearly fell into error here by referring to the ACA report which is extrinsic evidence, and not confining her determination of whether the words are capable of a defamatory meaning by purely looking at the words complained of an/or the passages in the impugned article. This is especially so since the ACA report was not within the public domain. It was not within sight of the 'ordinary reasonable man'. Refer to Singapore D Court of Appeal case of *Microsoft Corp v. SM Summit Holdings Ltd* [1999] 3 SLR (R) 465 and the case of *Soh Chun Seng v. CTOS-EMR Sdn Bhd* [2004] 5 CLJ 46.

Whether The Defence Of Reynolds Privilege Applied E

[28] The defence of *Reynolds* privilege is the defence of qualified privilege based on the decision of the House of Lords in the case of *Reynolds v. Times Newspaper Ltd* [2001] 2 AC 127. The defence is in essence a defence of publication in the public interest. The defence of *Reynolds* privilege moves the court away from examining the precise relationship between the F publisher and the publishee which is found in an ordinary case where a defence of qualified privilege at common law is raised. Refer to Duncan & Neill on *Defamation*, 3rd edn p. 203 to 205; and the case of *Jameel v. Wall Street Journal Europe Sprl* [2007] 1 AC 359.

[29] Having read the grounds of judgment of the learned trial judge, we G found, with due respect that Her Ladyship had failed to consider this defence when she relied her decision on *Aaron & Ors v. Cheong Yip Seng & Ors* [1996] 1 SLR 623, a Singapore case decided in 1996; and *Kelly v. O'Malley* [1889] 6 TLR 62 and held that the protection is rarely available for publication in the mass media, for the public as a whole will not have the relevant interest H or duty. She opined that in that instant case, the public have no interest in matters reported to the ACA unless the reports have been duly investigated and the culprits duly charged in the courts.

[30] Again we agree with the appellants/defendants and with due respect to the learned trial judge, Her Ladyship seems to have overlooked the I developments post 1996 in the law of qualified privilege that the scope of

such defence has now liberalised after the decisions of the House of Lords in the *Reynolds*' case (*supra*) and also the *Jameel*'s case (*supra*) granting greater freedom to the person to publish matters of genuine public interest.

[31] On this issue, we are of the view, it is not wrong for us, like the appellants/defendants, to rely on the *Berita Harian* case which is identical in terms of the news reported as with the impugned article herein, wherein the High Court had found in its judgment, that the *Berita Harian* article was entitled to the protection of the defence of qualified privilege in the form of *Reynolds* privilege referring to similar grounds in support as that relied on in the instant case. This decision, as mentioned previously, was upheld on appeal by the Court of Appeal. The relevant passage of the High Court's judgment at pp. 757 to 758, para. 18 is as follows:

> [18] The law in this field has been set out in the leading case of *Reynolds vs. Times Newspaper Ltd* [2001] 2 AC 127. The House of Lords as per the judgment of his Lordship Lord Nicholls formulated an illustrative and non-exhaustive ten point circumstantial test of responsible journalism. The factors or circumstances to be considered are as below bearing in mind they should vary from case to case and a practical and flexible approach should be adopted taking into account the facts of each case.
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> (a) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> In this case the chairman of LKIM made reference to a report being lodged with the ACA with regard to impropriety in respect of the management of LKIM and the activities being carried out without the approval of the board of LKIM. The court is of the view that this ingredient has been fulfilled.
>
> (b) The nature of the information and the extent to which the subject matter is a matter of public concern.
>
> Here LKIM is a statutory body set up to look after the interest and welfare of fishermen and the fishing industry and surely the public has an interest in the goings-ons of LKIM.
>
> (c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> The source of information came from none other than the chairman of LKIM. Further the first to the third defendant, upon checking with ACA, had the ACA confirm that there was a report.
>
> (d) The steps taken to verify the information.
>
> It is clear from the evidence that the defendant attempted to speak to the plaintiff to confirm the investigation and also contacted the ACA.

(e) The status of the information. The allegation may have already been the subject of an investigation which commands respect. A

The evidence shows that the guideline have been fulfilled.

(f) The urgency of the matter. News is often a perishable commodity.

In view of the seriousness of the allegation, the matter was urgent. B

(g) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. (Note: an approach to the plaintiff will not always be necessary)

Evidence shows that the defendant did seek clarification from the plaintiff and the plaintiff has admitted to that fact. C

(h) Whether the article contained the gist of the plaintiff's side of the story.

The plaintiff side of the story was not published as the plaintiff statement was only confined to his brief statement:- D

> "Kalau ada, sudah tentu BPR panggil saya", katanya yang kini bercuti sebelum bersara pada 23 April ini

However the first to the third defendants in subsequent articles published articles carrying statements from the relevant Ministers vindicating LKIM. See Bundle B page 3 and I quote:- E

> Jawatankuasa audit yang dilantik Kementerian Pertanian dan Industri Asas Tani mendapati tiada unsur penyelewengan dalam pemberian kontrak pembinaan Kompleks Lembaga Kemajuan Ikan Malaysia (LKIM) Kuala Kedah di Kampung Geluncur.
>
> Menteri Pertanian dan Industri Asas Tani, Tan Sri Muhyiddin Mohd Yassin, berkata Jawatankuasa itu mendapati dakwaan Pengerusi LKIM, Adam Hamid berhubung isu itu tidak membabitkan kepincangan penyelewangan tetapi hanya persepsi dan andaian semata-mata. F
>
> Perbalahan itu mendapat reaksi Perdana Menteri, Datuk Seri Abdulah Ahmad Badawi yang meminta pihak yang berbalah secara terbuka mengenai masalah dalaman jabatan berhenti serta-merta dan bersemuka untuk menangani sebarang perselisihan atau masalah yang dihadapi. G

(i) The tone of the article. A newspaper can raise queries or call for an investigation. It should not adopt allegations as statements of facts. H

The court is of the view that the tone of the impugned article purely raises queries and does not adopt allegations as to the statement of facts.

(j) The circumstances of publication, including the timing. The evidence shows that it has been fulfilled. I

A **[32]** As submitted by the appellants/defendants and we quote, the conduct of LKIM, a statutory body and/or its management, considering of public servants in so far as it raises misgivings over the awarding of contracts to third parties which on the face of it seem questionable, the conduct of public servants generally, good governance, the manner in which government funds B are utilised, possible corrupt practices and abuse of power, are serious matters and of legitimate public concern and interest. Even looking at rekod rayuan bahagian B1, pp. 118 to 119, the respondent/plaintiff (PW1) himself admitted during cross-examination that the contents of the impugned article dealt with serious matters of valid public concern and interest.

C **[33]** A call for investigation into suspected acts of corruption and abuse of power is certainly a matter of serious and legitimate public interest. Refer to *Flood v. Times Newspaper*'s case (*supra*). Hence, we agree with the appellants/ defendants that the learned trial judge fell into error when she held that the public have no interest in the matters reported to the ACA unless the reports D have been duly investigated and the culprits charged in court.

[34] Although the learned trial judge had rejected the appellants/defendants' defence of qualified privilege of the *Reynolds* privilege version, Her Ladyship had proceeded to look into the issue of malice and held at para. 233 of her grounds that the third defendant was actuated by malice in the publication E of the defamatory statements against the plaintiff.

[35] As submitted by the appellants/defendants and we agree, it is a legal requirement that in the event a plaintiff is desirous of relying on 'malice' in order to defeat or rebut any possible defence of qualified privilege that is raised by a defendant, it is incumbent upon the plaintiff to first plead by way F of a reply, the particulars of the specific facts and matters relied on from which an inference of malice is to be drawn. This is provided for by O. 78 r. 3(3) of the Rules of Court 2012, which is identical to the corresponding provision in the previous Rules of the High Court, 1980.

G **[36]** The word used in O. 78 r. 3(3) is "must". Hence, the requirement to plead is a mandatory requirement. The respondent/plaintiff, as pointed out by the appellants/defendants, has not only failed to plead particulars of the specific facts and matters relied on from which an inference of express malice is to be drawn but has altogether failed to file and serve a statement of reply to the defendants' defence which defence clearly pleads reliance on the H defence of qualified privilege. The plaintiff is therefore now prevented from raising evidence of express malice, if there are any in the first place.

[37] In *Subramaniam Parasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739 at p. 740, held [3] & [4], it was held as follows:

I Held (dismissing the plaintiff's claim with costs):

(3) Order 78 r. 3 of the Rules of the High Court 1980 ("RHC") operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must

serve a reply by giving particulars of the facts and matters from which malice is to be inferred. Thus, the plaintiff bears the burden to proof malice. The effect of O. 78 r. 3 RHC is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified. (paras 14 & 20)

(4) The plaintiff had failed to file a reply to the statement of defence and to put together a plea of malice as an answer to the defence of privilege as required under O. 78 r. 3 RHC. Instead, the plaintiff relied upon his statement of claim wherein he had alleged malice. There was no particulars of facts relied upon from which a finding of malice may be inferred or concluded although the word 'malice' was used. As such, the plaintiff failed to invoke malice as an answer to the defence of privilege. (paras 19, 20 & 21).

[38] On this ground, we are of the view that the learned trial judge had again fallen into error in holding that the third defendant was motivated by express malice in publishing the impugned news report.

Whether The Defence Of Absolute Privilege Applied Since The Impugned Article Reports On The Content Of An ACA Report.

[39] At the trial in the High Court, parties were asked by the learned trial judge to submit on this issue although the appellants/defendants had not pleaded the same. The learned trial judge was of the view, relying on the Federal Court case of *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833, that a report lodged by a complainant to the ACA is also an absolutely privileged document because it is akin to a police report. However, Her Ladyship further held that it has lost protection of absolute privilege as the ACA report was copied to four other parties, and it was also given to Wan Hazmir bin Bakar, the second appellant/defendant's senior news reporter who had interviewed the third appellant/defendant and that the third appellant/defendant had pleaded in summary the contents of his ACA report in his defence which is a public document upon its filing in the KLHC for this suit.

[40] Again, with due respect to the learned trial judge, it perplexed us how Her Ladyship reached the findings that the ACA report was handed to the reporter when the notes of evidence show otherwise. At p. 415 of rekod rayuan jilid 3, cross examination of the reporter by the respondent/plaintiff's counsel was as follows:

PL: Bukankah ini laporan BPR itu?

W4: Bukan, sebab saya tak pernah melihat surat ini sehingga pada perbicaraan pada kes saya dahulu.

Further, at p. 468 of rekod rayuan jilid 3, cross examination of the third appellant/defendant by the respondent's/plaintiff's counsel was as follows:

PL: Adakah ini Salinan laporan kepada BPR ini Dato menunjukkan kepada Wan Hazmir Bakar?

W9: Tidak.

[41] In *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, the Federal Court has *inter alia* held as follows:

> Held [2]: "It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the Court below be disturbed by the appellate Court unless it appears that those findings are clearly wrong ..."

[42] From the notes of evidence as cited above, it is absolutely clear that the learned trial judge had made wrong findings of fact on the issue of the reporter being given a copy of the ACA report.

[43] It is trite that the privilege acceded to an absolutely privileged document is absolute. This means absolutely nothing can cause it to lose its privilege status; even if the words published with full knowledge of their falsity and even with the express intention of injuring the claimant. Refer to Gatley on *Libel and Slander*, 11th edn, p. 377.

[44] In her grounds of judgment, the learned trial judge found that the impugned article regurgitated the contents of the ACA report. That being the case, we view, the ACA report, being an absolutely privileged document, the republication of it in the form of the impugned article would also enjoy the protection of ancillary absolute privilege i.e absolute privilege in an ancillary manner. The case of *Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim* [2010] 8 CLJ 239, cited by the appellants/defendants, is very relevant to this issue and we reproduce it *inter alia* as follows.

> [7] What then would be the position if say for instance, the defendant lodges a police report and then outside the Police Station the defendant is accosted by the press and the defendant repeats the contents of the Police report would it then attract Privilege? I find in such a case an alternative plea for ancillary Privilege would be available to the defendant. Ancillary privilege can only arise if the Police Report is absolutely privileged. It is dependent upon the existence of this Privilege (see Evans on Defamation 3rd edn, pp. 142 & 143, see also *Clarence Wilfred v. Tengku Adnan Tengku Mahmud & Anor* [1983] CLJ 518 (Rep); [1983] 1 CLJ 136). The lesser privilege ie, defence of qualified defence would also be available as a plea to the defendant. Ancillary Privilege arises where if it is established at the impugned news conference the defendant regurgitates the contents of the Police report. The privilege is ancillary to the privilege accorded to the Police Report although when at the news conference the press is not privy to the making of the police report itself. For ancillary privilege to apply, is it reasonable the defendant in the position that he was would be subject to scrutiny to by the media and thus repeating the contents of the Police report, would possibly allow the plea of ancillary privilege to arise in a situation where for instance Public interest justifies the publication of the Police Report.

[45] On this issue, we would also like to draw attention to the decision of the High Court in the *New Straits Times* case which decision was upheld by the Court of Appeal. It was held *inter alia* as follows:

> (4) The ACA reports were akin to police reports in that they both call for an investigation into suspected act of criminal wrong-doing (corruption), and as such would also be protected by absolute privilege. In the instant case, the contents of the NST report were substantially a regurgitation of the letter of complaint/report to the ACA and as such the protection of absolute privilege surrounding the ACA report would also attach to the NST report in an ancillary manner granting it absolute privilege status as well. In the circumstances, any action in respect of the NST report was bound to fail. (para 5).

[46] We therefore agree with the appellants/defendants that the learned trial judge had erred in holding that the ACA report had lost its absolute privilege status and that the defence of absolute privilege is not applicable in any manner.

Conclusion

[47] The main and essential element that need to be proven in order to maintain a cause of action in defamation is the requirement of reference to the plaintiff, that the words published were of and concerning the plaintiff. If it is not, then the plaintiffs' case will fail, without the court having to go through on other issues. In the *Berita Harian* and the *New Straits Times* cases, the same issue had also been canvassed and considered. The facts giving rise to the said two cases as mentioned earlier are identical to that in the instant case. The High Court in both cases had decided that a reference to the "management" cannot be construed as reference to the plaintiff singularly. And these decisions had been upheld and affirmed by the Court of Appeal. The fact that the Court of Appeal had upheld and affirmed the two decisions means that the High Court decisions are to be taken as if it is the decision of the Court of Appeal even though there is no ground of judgment written by the Court of Appeal. Hence, following the doctrine of *stare decisis*, the decisions bind the High Court and the court below. As such, we feel the learned trial judge had fallen into grave error when Her Ladyship overlooked this.

[48] To conclude having perused the appeal records and considered submissions made by the parties written as well as oral, in the light of the above reasoning we unanimously allowed this appeal. We awarded global costs of RM30,000 here and below for the appellants/defendants and ordered the deposit to be refunded.